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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

17 Cr. 722 (VSB)

5 SAYFULLO HABIBULLAEVIC SAIPOV,

6 Defendant.

7 -----x

January 23, 2018  
12:15 p.m.

9 Before:

10 HON. VERNON S. BRODERICK,

11 District Judge

12 APPEARANCES

13 GEOFFREY S. BERMAN

14 Interim United States Attorney for  
15 the Southern District of New York

16 BY: AMANDA L. HOULE

Assistant United States Attorney

17 FEDERAL DEFENDERS OF NEW YORK

18 Attorneys for Defendant

19 BY: DAVID E. PATTON

JENNIFER L. BROWN

20 DAVID STERN

21 Attorney for Defendant

22 ALSO PRESENT:

23 YANA AGOUREEV, Russian Interpreter

24 SANJAR BABADJANOV, Uzbek Interpreter

25 MICHAEL DE LUCA, Paralegal, USAO

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1 (Case called)

2 MS. HOULE: Good afternoon, your Honor. Amanda Houle  
3 for the government. With me at counsel's table is Michael  
4 DeLuca, a paralegal from our office.

5 THE COURT: Good afternoon.

6 MR. PATTON: Good afternoon, your Honor. David  
7 Patton, Jennifer Brown, and David Stern, on behalf of  
8 Mr. Saipov. Apparently we are still waiting for the Uzbek  
9 interpreter.

10 THE COURT: Oh, okay. All right. So why don't -- you  
11 may be seated. Sorry about that. Let me make sure, am I  
12 correct that we have a Russian interpreter? Is that right?

13 MR. PATTON: That's correct, your Honor, but it would  
14 be --

15 THE COURT: I have no problem with waiting for the  
16 Uzbek interpreter, but let me just be sure, Mr. Saipov, can you  
17 hear the interpreter?

18 THE DEFENDANT (In English): Yes.

19 THE COURT: Hold on two seconds.

20 So we will wait until we get the Uzbek interpreter  
21 because I don't want to have a situation where Mr. Saipov  
22 doesn't understand exactly what's going on here. All right?  
23 So I apologize for the delay, but we will get started shortly,  
24 as soon as the interpreter arrives. Okay?

25 MR. PATTON: Thank you.

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1 THE COURT: Thank you very much.

2 (Recess)

3 THE COURT: Mr. Saipov, can you hear and understand  
4 the interpreter?

5 THE DEFENDANT (In English): Yes.

6 THE COURT: All right. So we are here for a status  
7 conference.

8 I have several letters from the parties, including a  
9 December 15 letter from the defense. I issued a court order on  
10 January 5. The government made a motion for reconsideration  
11 with regard to that order of endorsement on January 5; the  
12 defense opposition to the motion for reconsideration.

13 I issued an order on January 8 that, among other  
14 things, indicated that I would take those issues up today here  
15 in court, in other words, the motion for reconsideration.

16 The government submitted a letter in further support  
17 of its motion for reconsideration on January 22.

18 I have received two status update letters, one from  
19 the government dated January 16 and one from the defense dated  
20 January 17.

21 In addition, certain of the letters -- yes.

22 THE INTERPRETER: Please be slower.

23 THE COURT: Slower? Okay. Sorry about that.

24 Certain of the letters, although portions of the  
25 letters were redacted, so I received unredacted versions of the

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1 redacted letters, which were filed on the docket.

2 Are there any materials or letters or correspondence  
3 that I have omitted that I should have in connection with  
4 today's conference?

5 From the government?

6 MS. HOULE: No, your Honor.

7 THE COURT: From the defense?

8 MR. PATTON: No, your Honor.

9 THE COURT: So the way I would like to proceed is, I  
10 would initially like to deal with the issue of the  
11 reconsideration. I would then like to deal with the issue of  
12 the motion schedule. And then, lastly, I would deal with the  
13 issue relating to a trial date. Then at the end, I would open  
14 up the discussion for any other matters that the parties  
15 believe it is appropriate for me to take up at this time.

16 So, first, with regard to the motion for  
17 reconsideration, in connection with that, I do have several  
18 questions and points. I guess what I will do is the following,  
19 because I don't believe that either side has struck the balance  
20 that I think is appropriate here. You know, the initial  
21 request by the defense was to preclude the government from  
22 having access to the visitor log. I thought that that was --  
23 well, that didn't, in my mind, strike the correct balance. The  
24 government's response, in essence, said, and I am paraphrasing  
25 here, that they can and should have access to the visitor --

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1 unfettered access to the visitor log.

2 I think that my reading of the law is something less  
3 than both positions for the following reasons, and then I will  
4 open it up for discussion. I will have several questions and  
5 open it up for discussion.

6 First, with regard to the -- I already had made an  
7 earlier decision with regard to the defense request, and I set  
8 up a process by which there would be *in camera* review of the  
9 individuals on the visitor log who are being proposed by the --  
10 that the government not have access to. That obviously was the  
11 subject for the motion for reconsideration.

12 With regard to the reconsideration, there are a couple  
13 of things. It may be that the visitor log itself and the  
14 potential experts, whether they are testifying, might be  
15 testifying, or consultative experts, that that mere fact may  
16 not be privileged, but it certainly, I think, implicates the  
17 work product doctrine.

18 It is clear to me that I have the authority and, in  
19 fact, based upon my reading of the CJA Act, in fact, under  
20 Title 18 United States Code 3006A(e)(1) defense counsel -- and  
21 I will read it, "Upon request, counsel for a person who is  
22 financially unable to obtain investigative, expert, or other  
23 services necessary for adequate representation may request them  
24 in an *ex parte* application. Upon finding, after appropriate  
25 inquiry in an *ex parte* proceeding, that the services are

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1 necessary and that the person is financially unable to obtain  
2 them, the court or the United States magistrate judge, if the  
3 services are required in connection with the matter over which  
4 he has jurisdiction, shall authorize counsel to obtain the  
5 services."

6           So there have been several cases that have discussed  
7 that issue in the context of the CJA Act. I see no reason why  
8 the application of the logic behind the *ex parte* basis for that  
9 request shouldn't be applied here. So in *United States v.*  
10 *Marshall*, 423 F.2d 1315, 1318, the Fifth Circuit held "that the  
11 manifest purpose of requiring that an inquiry be *ex parte* is to  
12 ensure that the defendant will not have to make premature  
13 disclosure of his case. Even though the rights established by  
14 Section 3006A(e) are clearly procedural and appellant could  
15 have waived the services provided therein by not timely moving  
16 under subsection (e), we cannot countenance use of any other  
17 than *ex parte* determination if a motion does in fact come under  
18 that statute. In most instances, the hearing should be held in  
19 the absence of the prosecution."

20           The Tenth Circuit agreed with that logic in *United*  
21 *States v. Sutton*, 464 F.2d 552, where the district court had  
22 failed to hold an *ex parte* hearing for authorization to hire an  
23 investigator and the court reversed the defendant's conviction  
24 on that basis.

25           So there is a basis, albeit not a privacy interest,

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1 necessarily, and perhaps not directly a direct privilege claim,  
2 there is a basis, in my view, for the defendant's request that  
3 the government not have access at this stage to the names of  
4 the experts.

5 Having said that, I also recognize the government's  
6 interest in connection with whether it is an ongoing  
7 investigation or national security interest with regard to this  
8 case.

9 In light of that, I am going to make -- I make the  
10 following -- well, let me ask one question. Who is going to be  
11 dealing with this issue on behalf of the defense?

12 MS. BROWN: I am, your Honor.

13 THE COURT: In connection with -- I don't remember  
14 which letter, but there was an indication that the visitors to  
15 Mr. Saipov have to be, is it approved by the Bureau of Prisons?  
16 If you could explain the process that the BOP -- that you, the  
17 defense goes through with the BOP.

18 MS. BROWN: Yes, your Honor.

19 We have to give advance notice through the legal  
20 department, Adam Johnson, of any visitor that we want to have  
21 visit with Mr. Saipov. They have to approve or deny the visit,  
22 and they send a letter to the front desk so that no one can  
23 enter without having been expressly approved by legal.

24 THE COURT: Okay. And typically is that a same-day  
25 request or does it take a week or two for that to be processed?

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1 MS. BROWN: In advance, your Honor. Not same day. It  
2 may be several days, but in advance.

3 THE COURT: Okay. Thank you.

4 This is my proposal, and then I will hear from the  
5 parties, because it does appear, I think, again, that there  
6 is -- at least the defense threw out or, I will say, proposed  
7 the issue of having wall counsel or, for lack of a better term  
8 or a wall team review that. The government, in response,  
9 indicated that although it still believed that there was no  
10 basis to preclude it from having access to that, I think I have  
11 indicated that my ruling is that I believe there is a basis for  
12 that. But the government also indicated, I think, that that,  
13 as an alternative, that would be something that could work.

14 So let me make the following proposal, which is, based  
15 upon what I heard today, that the government establish a wall  
16 team. Whatever the composition is, obviously I will leave that  
17 up to the government. Obviously that team is not to --  
18 consistent within the case law, should not have any part in the  
19 prosecution itself, and their sole responsibility with regard  
20 to this case would be to review names.

21 At this point I'm going to suggest something that's  
22 slightly different than I think where the parties are. I think  
23 when the defense makes the request to the Bureau of Prisons to  
24 the legal department, that those requests -- and I don't know,  
25 as a practical matter, how this would occur but, again, I will



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1 leave that to the parties -- that those requests in or about  
2 the same time would be communicated to the assistant in charge  
3 of the wall team.

4 The wall team would then do whatever diligence they  
5 believe is appropriate to vet that individual, for lack of a  
6 better term.

7 Once the determination is made -- and obviously they  
8 should do so as expeditiously as possible, and hopefully so  
9 that that will dovetail with the amount of time that --  
10 typically the turn around time that it takes. But whatever  
11 time it takes, the wall team will do that.

12 The individual will not be permitted to visit until  
13 such time as either the wall team -- the assistant, whoever the  
14 assistant is, contacts the legal department and indicates that  
15 there isn't an issue with the particular visitor who has asked  
16 to visit. Obviously that should not -- who that individual is  
17 shouldn't be disclosed to the trial team.

18 If there is an objection, those objections -- the  
19 objections should come to me with a detailed explanation as to  
20 what the objection is with regard to the particular visitor. I  
21 will review it and make a determination. I am assuming that  
22 the objection will be such or could be such that that objection  
23 can be, if it involves national security interests and the  
24 government believes it is appropriate, can be made under seal.  
25 However, to the extent that any portion of the government's

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1 objection can be, in other words, the objection can be  
2 redacted, it should be done in that fashion. But obviously the  
3 wall assistant should let the defense know that there is an  
4 objection that is going to be filed.

5 And obviously I would attempt to make my decision as  
6 expeditiously as possible so that the case can move forward.

7 So that is my suggestion of a resolution of the  
8 matter. So just to be clear, that would mean I would be  
9 granting in part, I guess, and denying in part the government's  
10 motion for reconsideration.

11 So I have reconsidered my decision, in part, just to  
12 be clear, I think that my involvement should come later in the  
13 process. I obviously don't have access to the resources that  
14 the government has to make an assessment of whether there is an  
15 issue with regard to a particular visitor, so that's why I have  
16 set it up in the way that I have.

17 So let me hear from the government. Does that  
18 proposal make sense?

19 MS. HOULE: Thank you, your Honor.

20 With regard to your Honor's position regarding 3006, I  
21 think, in the government's view, that is distinguishable in  
22 that an application under 3006 would include information that  
23 is not included in the visitor log that would expose defense  
24 strategies, such as, why the expert is required, the details of  
25 the expert's expected testimony, and the extent to which the

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1 defense intends to use that expert at trial.

2           Nonetheless, we understand your Honor's reasoning, we  
3 appreciate your consideration of this, and we think that the  
4 wall team is the most appropriate avenue to ensure that law  
5 enforcement are able to review the log in its entirety.

6           Just one question, your Honor, about this approach.  
7 To the extent that the prosecution case team sought access to  
8 the log for purposes of this trial, would your Honor permit the  
9 case team to review a redacted version of the log at that  
10 point?

11           THE COURT: Oh, yes. I'm sorry. So the portion of my  
12 order with regard to the redaction of the log would remain. So  
13 if there was a determination that there was an objection that  
14 the defense was submitting someone, yes, the answer is yes.  
15 Sorry.

16           MS. HOULE: Thank you, your Honor.

17           THE COURT: I apologize. I should have made clear  
18 that part of the process I was suggesting was so that the  
19 government could have access to the portions of the log that I  
20 believe that there really is an objection to by the defense.  
21 In other words, that under normal circumstances, the government  
22 would have -- would be able to have access to a visitor log.

23           MS. HOULE: Understood. Thank you.

24           THE COURT: All right?

25           From the defense.

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1 MS. BROWN: Your Honor, our preference was the balance  
2 that you had struck on your initial decision, because the  
3 further away from the prosecution, the less risk there is of  
4 them learning about what we think is protected by the Sixth  
5 Amendment defense strategy.

6 THE COURT: Let me just be clear about that. First of  
7 all, I think that, as I mentioned, I am not -- I don't have  
8 access to the information that the government has. Second, the  
9 government establishes the wall team, and I am assuming that  
10 they are going to abide by the process and procedures that are  
11 appropriate in connection with that. If that is violated in  
12 some way, that's a separate issue, and that's something I would  
13 need to deal with at that time.

14 I understand the government's position that they  
15 believe that 3006A is something different, but just to make a  
16 finer point of it, you know, there could be situations where,  
17 because the government, as I understand it, the intention would  
18 be and the reason to get the log would be to actually  
19 scrutinize the individuals on that log. Were the defense to  
20 have an expert, let's say, either the defense had not made a  
21 decision about whether to retain an expert to testify, but was  
22 retaining an expert, let's say, for purposes of consultation,  
23 and the particular area of consultation that the expert is  
24 being retained at is a pretty narrow band. The disclosure of  
25 that information, although, yes, the actual request made by

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1 defense in 3006 is more detailed than would be on the log, the  
2 issue would be, as the prosecution then would be in a position,  
3 through its own research, to make a determination what the, in  
4 essence, the substance of what that expert is being retained to  
5 do.

6 Now, the legal question about whether that crosses a  
7 line is something that I don't need to opine on at this time.  
8 So I understand what the defense's position is, but I think, in  
9 order to strike the balance, in particular in light of the fact  
10 that I don't have access to the information and therefore would  
11 not be in a position to do this, I think that establishing the  
12 wall counsel is the appropriate thing to do in this case.

13 MS. BROWN: So I understand that balance, your Honor.  
14 The advance notice requirement is very problematic. So right  
15 now the procedure, your Honor, Mr. Saipov is housed in  
16 10 South, which is the most secure area of the facility. And  
17 as things stand now, we are required to give advance notice to  
18 the legal team that is in charge of security in that area. So  
19 the vetting that goes on to make sure that folks that come into  
20 that area is of course diligent. And so this idea that, as  
21 things stand now, we -- as long as it is approved by the BOP,  
22 who is in charge of the safety of the inmates, as long as they  
23 say it is okay for an expert to come in, the expert could come  
24 in. The idea that now we are going to have to wait a certain  
25 amount of time and that they could actually veto one of our

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1 experts coming in is problematic, your Honor. There has been  
2 no indication -- now, I don't know what was sent to the court  
3 *ex parte*, but there has been absolutely no explanation that the  
4 BOP cannot satisfactorily perform that safety --

5 THE COURT: Okay. Well, let me ask this. Do you know  
6 whether the BOP has access to the national security information  
7 that would be necessary to vet individuals in this case?

8 MS. BROWN: I have not asked that question, your  
9 Honor.

10 THE COURT: Does the government know whether the BOP  
11 individuals, the people who typically make these decisions,  
12 have access to such information?

13 MS. HOULE: They don't, your Honor. For the reasons  
14 set out in the government's submission to this court, in this  
15 case in particular, it is necessary for law enforcement, the  
16 F.B.I., to review the visitor log.

17 THE COURT: Okay. So in light of that, I understand  
18 the defense's position, but it seems to me that, yes, I agree,  
19 in a normal case, where there might not be national security  
20 implications or even -- I guess I would say even the need to  
21 have knowledge, that typically would be something that is  
22 covered by SIPA, that's something that the BOP officials don't  
23 have. And therefore, although I think in a normal circumstance  
24 they would be equipped to make that determination, in this  
25 circumstance I believe that the necessary step is that wall

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1 counsel be provided.

2 Obviously, if this process leads to extensive delays,  
3 then I will hear from the parties and try and do something to  
4 streamline the process, but I think that the suggested process,  
5 I think, is something that will -- and also, just to be clear,  
6 the initial way it had been structured would have been when --  
7 I think this strikes a balance that I think is necessary in  
8 this case.

9 MS. BROWN: Understood, your Honor.

10 We do have one particular visit scheduled already of  
11 someone that's already been approved, and so I'm concerned,  
12 because experts are difficult to schedule, and so I don't want  
13 that visit to be delayed. This is someone that's been approved  
14 and already visited. So I don't want this change of procedure  
15 to impact that scheduling which has been difficult.

16 THE COURT: I guess what I will say is this: To the  
17 extent that there have been visitors who have already visited,  
18 the wall team can have access to the log. My suggestion would  
19 be that they look at the log as it stands and make a  
20 determination about whether or not -- I understand that there  
21 may be -- that someone has already visited, but there -- and  
22 I'm not saying there is going to be any problem, but that they  
23 would review the log as it currently stands, and if there is an  
24 objection to anyone, that that objection be made known to me  
25 and that the prosecution let the defense know that there is

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1 going to be objection. And that should be coming obviously  
2 from the wall assistant and the wall team, and the prosecution  
3 should not be involved in that discussion.

4 MS. HOULE: Yes. Thank you, your Honor.

5 THE COURT: All right.

6 Is there anything else on the issue of the motion for  
7 reconsideration?

8 MS. BROWN: The only thing I would ask is if you would  
9 consider setting some outer limit. I understand that you want  
10 it to be done expeditiously, but a directive from the court  
11 that, you know, any review will -- the expectation that it will  
12 be done in X number of days, so it doesn't overly burden our  
13 scheduling.

14 THE COURT: Again, what I would do is leave it to the  
15 parties in that sense, because since I don't know who the  
16 individual experts are, when they would necessarily intend to  
17 visit, it may be under certain circumstances that there is a  
18 certain amount of lead time that's fine because the expert  
19 isn't available for several weeks. There may be circumstances,  
20 though, where there is a narrow window. So I will leave it  
21 to -- and the government, once the wall team is established,  
22 obviously you should communicate, the wall team should  
23 communicate with the defense so you know who these folks are,  
24 so that when you do begin the process of providing the names to  
25 the Bureau of Prisons, that you know who to contact to see



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1 where they stand in terms of their vetting process. Okay? All  
2 right.

3 Now with regard to scheduling of the motion schedules,  
4 I see the microphone shifting over, so I take it, Mr. Patton,  
5 you are going to be handling that.

6 My question is the following: With regard to the -- I  
7 recognize the two different proposals, one being 30 days from  
8 the date that the Department of Justice makes a determination  
9 about whether or not the government intends to seek the death  
10 penalty, as opposed to October 1, which is keyed off of the  
11 outside date that the government has provided of September 1  
12 for making -- for that decision to be made.

13 Let me ask this with regard to the -- are there any  
14 motions, Mr. Patton, that you envision at this time, based upon  
15 the discovery that has been obtained, that are not directly  
16 related to the decision of whether the government seeks the  
17 death penalty?

18 MR. PATTON: There are, your Honor, but I don't know  
19 that they would end up being filed if the decision by the  
20 government were "no seek."

21 THE COURT: You are anticipating what my next question  
22 was going to be, and that was whether or not there could be a  
23 staging of motions. But I understand that there may be reasons  
24 why you want to hold in abeyance the filing of all of the  
25 motions until such time the determination is made.

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1           So this is what we are going to do with regard to the  
2 motions. We are going to -- I'm going to set October 1 as a  
3 date for the motions. However, that date is subject to  
4 potentially change if in fact the government, the Department of  
5 Justice has made a decision with regard to the death penalty in  
6 advance of the September 1 date. So I would put the onus on  
7 the parties that, once that decision has been reached, if it is  
8 in advance of September 1, for the parties to meet and confer  
9 about a motion schedule. In other words, and it depends  
10 upon -- obviously, if it is August 30 that the decision is  
11 made, that I view as different than if it is, you know, in June  
12 or July. And I guess what I am saying is that I would revisit  
13 the scheduling of the motion and I would want to hear from the  
14 parties how much -- in light of the fact that the decision has  
15 been made, whether or not we can advance that October 1 date.

16           I understand that it is conceivable that, depending  
17 upon when that happens, there may be the individual lawyers who  
18 may be responsible for particular motions may be otherwise  
19 engaged. But the purpose for my ruling is to allow flexibility  
20 so that if we can advance that date of October 1, we would do  
21 that.

22           And then the proposed schedule thereafter obviously,  
23 you know, I don't have a problem with 30/30 -- basically 30  
24 days, 30 days, and then two weeks on reply; however, if there  
25 is an earlier decision, I will leave it up to the parties to

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1 present to me a proposed schedule that accelerates that date.  
2 Obviously if, because of counsel's obligations on either side,  
3 the October date still would make most sense, then we will just  
4 stick with that date.

5 Let me hear from the parties with regard to that  
6 proposal. From the government?

7 MS. HOULE: Understood, your Honor. Thank you.

8 THE COURT: All right. From the defense.

9 MR. PATTON: Understood, your Honor.

10 I will say that, even now, if we got an earlier  
11 decision over the summer, I would anticipate that we would be  
12 coming back to the court asking for additional time. The  
13 motions that we anticipate, if there is a decision to seek, are  
14 voluminous.

15 THE COURT: I understand. And I understand this is  
16 not a static process, it is dynamic, and decisions are being  
17 made with regard to that issue.

18 So the third issue is the trial date. I know the  
19 government has proposed a trial date of April 2019 or somewhere  
20 in that range. The defense has mentioned a date of September  
21 2019 as a trial date. But I think I need some additional  
22 information, and this goes a little bit to where things stand  
23 in terms of discovery.

24 As I understand from the government's letter, the  
25 discovery has been substantially made. Are there materials

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1 that the government is currently aware of that it still needs  
2 to turn over to the defense?

3 MS. HOULE: No, your Honor.

4 THE COURT: Are there materials that, and again this  
5 may be covered by my prior question, but are there materials  
6 that the government has not yet received that the government  
7 anticipates receiving that will need to be turned over to the  
8 defense?

9 MS. HOULE: No, your Honor.

10 And if I may, your Honor, just on the point of  
11 discovery, the defense made reference in one of their  
12 submissions to the discovery being more than a terabyte. The  
13 discovery in this case is not extraordinarily voluminous. That  
14 terabyte consists mainly of videos and photographs of the  
15 attack as well as the contents of the defendant's phone.

16 THE COURT: Let me ask this with regard to the  
17 discovery that has been produced. Do you have a sense of how  
18 much of that discovery will require the preparation of the  
19 transcripts? In other words, where there are foreign language  
20 materials that have been provided, and do you have a sense of  
21 what the timing will be with regard to the government's  
22 preparation of those materials.

23 MS. HOULE: Thank you, your Honor.

24 The government is in the process of preparing  
25 translations of the materials, particularly on the defendant's

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1 phone. To the extent that the defense is willing to enter into  
2 a standard stipulation that those transcriptions will not be  
3 used for litigation purposes, the government can produce those  
4 on a rolling basis once they become available. We expect that  
5 they will begin to become available within the next two weeks.

6 THE COURT: Okay. Then obviously the parties should  
7 meet and confer with regard to the -- again, if it is the  
8 standard agreement that the parties typically enter into and  
9 obviously start making those available.

10 Do you have a sense, though -- I understand that on a  
11 rolling basis they could -- you could start producing in two  
12 weeks. Do you have a sense of when that process might be  
13 completed?

14 MS. HOULE: The substantial volume of those  
15 transcriptions, your Honor, or translations would be available  
16 within the next three weeks; and as the government continues to  
17 identify materials that should be translated thereafter, it  
18 will quickly have them translated and provided to defense.

19 THE COURT: All right. That is helpful.

20 The next question I have is, I would like to get a  
21 sense, on the basis of an outside date, how long the parties  
22 anticipate the case would be? This is not something I am  
23 obviously going -- that is set in stone, that I am going to  
24 hold the parties to, but I think for purposes of (a) my setting  
25 aside the time for the trial, but (b) so that counsel can make

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1 decisions concerning their own calendars, I would like to get a  
2 sense of what the parties -- and as part of that, have the  
3 parties actually discussed the issue related to how long a  
4 trial might be?

5 Go ahead.

6 MS. HOULE: We have discussed it at a general level,  
7 your Honor, with the defense. I think that the defense takes a  
8 different view as to how long they anticipate jury selection in  
9 this case will take. But as to the government's proof at  
10 trial, if we were in a situation where the government was  
11 seeking the death penalty, the government anticipates that its  
12 case on the guilt phase would be, conservatively, approximately  
13 three weeks and that the penalty phase would take approximately  
14 the same amount of time.

15 THE COURT: Okay.

16 MR. PATTON: Your Honor, may I be heard briefly on  
17 that.

18 THE COURT: I was thinking about asking how long you  
19 think, but I understand that it is -- that is a long way off.  
20 I was just thinking in my own mind, and I would just add a  
21 certain amount of time to that.

22 So go ahead, Mr. Patton.

23 MR. PATTON: I just think that it is entirely likely  
24 that those estimates are on the short end, just given my own  
25 limited personal experience trying capital cases. But I know

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1 from talking to Mr. Stern, who has tried more, and from our  
2 consultations with the Federal Death Penalty Resource Council,  
3 the fastest that jury selection happens where there is a need  
4 for an awful lot of individual *voir dire* on the issue of the  
5 death penalty, the fastest it seems to ever happen is a month.

6 I know the last trial that Mr. Stern tried, it took  
7 two months.

8 THE COURT: And just so I have, and I apologize for  
9 interrupting, but does that include a process of initially  
10 screening the jurors through some process, such as a  
11 questionnaire and, in other words, getting -- whittling down  
12 the pool of folks and even having the parties review them for  
13 cause initially?

14 MR. PATTON: I think we will almost certainly propose  
15 a questionnaire. I think the government in the past has been  
16 amenable to that and it is often used. But even with a  
17 questionnaire, there tends to be an awful lot of follow-up  
18 because the questions and the answers are not always terribly  
19 black and white.

20 THE COURT: I understand. I guess my question,  
21 though, went to the statistics that you were providing with  
22 regard to the one month -- in other words, I want to get a  
23 sense of whether I am comparing apples to apples. In other  
24 words, if that includes as part of the process, the  
25 questionnaire process, that the shortest time that folks have

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1       been -- have seen has been approximately a month.

2               MR. PATTON: Mr. Stern is communicating that he has  
3       never done a capital trial without a questionnaire. So the  
4       timing that we are providing the court is with a questionnaire.

5               THE COURT: Okay.

6               MR. PATTON: And in terms of the merits versus penalty  
7       phase of the trial, I don't have any specific reason to think  
8       that the government's estimate of three weeks on the merits  
9       phase is wrong. I would think that that is an aggressive  
10      schedule for a variety of reasons, but I don't have any  
11      particular reason to push back on the three weeks. I do think  
12      that the penalty phase could well last longer than that. The  
13      government typically in a penalty phase will put on a  
14      significant case and the defense, unlike many merits phases,  
15      will itself put on a significant case. And so I think that the  
16      court should anticipate a longer period of time than three  
17      weeks for any penalty phase.

18              THE COURT: All right.

19              MS. HOULE: Your Honor, as noted in the government's  
20      letter, jury selection could begin before April of 2019, and  
21      the government has also conferred with the capital case  
22      committee about the variety of time spans that have been used  
23      for jury selection. There are instances where it was less than  
24      one month. In a case that we think is an apt comparator, which  
25      is the prosecution of Dylann Roof in South Carolina, which was



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1 also a single defendant, single incident case, jury selection  
2 took approximately two weeks.

3 THE COURT: Okay. But does that include the process  
4 of -- were there questionnaires in that case?

5 MS. HOULE: I believe so, your Honor.

6 THE COURT: Does that include -- the two weeks include  
7 that process? In other words, because I think -- and, again, I  
8 don't know the exact process, but participating in cases, not  
9 death penalty cases, where questionnaires have been used, they  
10 go out to a whole host as part of a panel, you get them back,  
11 the parties are given a certain amount of time, and then they  
12 compare notes as to whom should be -- which potential jurors  
13 should be dismissed for cause, and then we would proceed  
14 with -- so what I am trying to figure out is whether those two  
15 weeks includes that or not. Do you know?

16 MS. HOULE: I don't know specifically, your Honor,  
17 about the timing of sending out the jury questionnaires in that  
18 case. Even if we were to assume that this was going to take  
19 four weeks, the government has proposed that we start the  
20 questionnaire process in March so that we can proceed to trial  
21 in April.

22 THE COURT: I don't have a problem with -- I guess  
23 from my perspective I am including all of that as part of jury  
24 selection.

25 MS. HOULE: Understood.

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1           THE COURT: So I think that -- again, I don't know,  
2 but I am thinking in terms of allotting time, the jury  
3 selection through to the end of trial and, again, this is  
4 outside dates, if you are saying three weeks and three weeks,  
5 and I understand the defense's position that it is going to  
6 likely take longer, I think we are talking about setting aside  
7 somewhere in the order of three months to four months to be on  
8 the safe side. Again, I am just saying -- what I am saying to  
9 the parties is that that seems to me to be something that the  
10 parties should at least in their own calendars try and leave  
11 that time period free for the purposes of the case. I'm not  
12 saying -- and I have to think about it. I typically do not  
13 set -- I know some of my colleagues set trial dates at initial  
14 appearances. I typically do not do that. I wait until I get  
15 more information from the parties before I set a date.

16           But let me hear, is there anything else from the  
17 government?

18           MS. HOULE: Just on that point, your Honor, even  
19 accepting sort of the defense's view that this could extend  
20 beyond four months, including jury selection, the government  
21 thinks that setting the April trial date would still be  
22 appropriate here. While it is possible that starting in April  
23 could start to run into the end of summer holidays, under the  
24 defense's request, trial would begin in September and so at any  
25 point in the year, your Honor, you set a date, if you are going

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1 four months out, you are going to run into some sort of  
2 holiday. We don't think that's avoidable here.

3 THE COURT: My experience has been in the trials I  
4 have had that there is no particular date that is going to  
5 work. Obviously I think either the September date or the April  
6 date, my assumption is that there are going to be vacation  
7 schedules, holiday schedules, and other things that would --  
8 where there would be -- where there would be issues, and we  
9 would deal with that in terms of the amount of jurors that we  
10 get. So I don't think -- and I saw the argument in defense's  
11 paper with regard to the summer. I think there are other  
12 issues that will be more of a dispositive factor concerning  
13 whether jurors are going to be able to sit or not on the case.  
14 So I don't view that as a particularly -- that's not a  
15 particularly weighty consideration on my part.

16 MS. HOULE: Understood, your Honor.

17 The schedule that the government put forward was an  
18 attempt to address the defense's request for additional time to  
19 prepare mitigation, their request to hold the motion schedule  
20 in abeyance until the capital case process is complete; and  
21 under the current schedule, this would enable -- an April trial  
22 date would allow for at least five months for trial preparation  
23 after the motions are briefed. We think that that is fair to  
24 the defendant. We think that that accommodates many of the  
25 issues that the defense has raised.

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1           And as set out in the letter, we think that there are  
2 other important equities at play here. When there is an attack  
3 such as this one, where eight people are murdered and others  
4 are critically and permanently injured, those victims and their  
5 families and the public deserve a speedy trial. These victims  
6 are looking for how this process is going to play out, what it  
7 looks like, and how they fit into it. Having a certain trial  
8 date will enable them to prepare for that and enable the  
9 government to efficiently ensure that they can be present at  
10 trial, which will require coordination with foreign  
11 governments.

12           THE COURT: Let me ask you this: When you say  
13 coordination with foreign governments, are you anticipating the  
14 need to involve the State Department in obtaining visas for  
15 individuals to come to the country either to testify in the  
16 case? Is that what --

17           MS. HOULE: We will need to work through the State  
18 Department, we will need to submit MLATs to foreign entities to  
19 ensure that all of the sort of boxes are checked on their end,  
20 to permit citizens to come to the United States and testify  
21 here.

22           THE COURT: How much time typically, do you have a  
23 sense of how much time that typically requires? What I am  
24 trying to do, just so that you know, is decide whether or  
25 not -- because I'm not sure I have entirely enough information

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1 to make the decision now as to when the trial will be, but what  
2 I am trying to gauge is how much time you would need. Because,  
3 obviously, if the decision is made in May, the date that you  
4 proposed would be 11 months away. Would that be sufficient  
5 amount of time for the government to do what it needs to do to  
6 make sure that -- and I am not saying that I am going to do  
7 this, and I'm not saying that I would wait until then to make a  
8 ruling as to a trial date, but would that amount of time be  
9 sufficient?

10 MS. HOULE: Yes, your Honor.

11 THE COURT: Mr. Patton.

12 MR. PATTON: Your Honor, I agree with the court's view  
13 that, no matter when we set a trial date, ultimately there will  
14 be scheduling issues. I do think that the summer tends to be  
15 the worst possible time.

16 But leaving that aside, our main reason for not  
17 setting a trial date now or at the very least setting one  
18 further out than when the government is proposing is because we  
19 just need more time than that. The average, again, going back  
20 to the statistics compiled by the Federal Death Penalty  
21 Resource Council, the average time, since 2004, for all capital  
22 trials around the country, from indictment to trial, has been  
23 36.5 months, so just a little over three years.

24 We are, I think, being quite reasonable and proposing  
25 a schedule in good faith that is far more aggressive in a case

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1 that is far more complicated than the typical capital case. To  
2 put on a capital mitigation case in a penalty phase where the  
3 vast majority of the defendant's life is literally halfway  
4 around the world poses extraordinary logistical challenges for  
5 us in preparing.

6 THE COURT: Let me ask a similar question to the  
7 government. Assuming that the schedule -- again, I understand  
8 with regard to the death penalty -- proceeds as the parties  
9 anticipate, in other words, that the defense makes their  
10 mitigation submission to the Department of Justice in May, that  
11 a decision is rendered at the latest by September 1 of 2018, is  
12 the time frame from September 1 to April a sufficient amount of  
13 time to --

14 MR. PATTON: No, your Honor.

15 THE COURT: What would be? Assuming the September  
16 decision.

17 MR. PATTON: An April trial date would be half the  
18 average time of a capital case to trial from indictment in a  
19 case that's certainly far more complex than the average trial.

20 The government talked about a two-week *voir dire* in  
21 Dylann Roof. Well, Mr. Roof was largely representing himself.  
22 I don't think that that is a terribly apt comparison for our  
23 situation here. Eighteen months is just simply not enough time  
24 for us to do all of the things that we are talking about doing  
25 here. Everything we do in this case, given Mr. Saipov's

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1 location in 10 South, given the hoops that we need to jump  
2 through for expert visitation, given all of the difficulties in  
3 meeting with family, it's not like we just take a drive or a  
4 quick trip to meet with an enormously extended family or to  
5 gather records or to have the cooperation of government  
6 agencies the way that we are going to need in Uzbekistan.  
7 Those things are tremendously time consuming. Even on an  
8 aggressive motion schedule like the one we have proposed, we  
9 are not going to have decisions on those motions surely at the  
10 very earliest until the end of this calendar year, and that's  
11 not including *in limine* motions, which themselves, I think,  
12 could be quite complicated, given some of the issues that we  
13 foresee in this case.

14 So this trial will be dramatically different,  
15 depending on the government's decision to seek. It could be  
16 dramatically different depending if the government does seek,  
17 depending on the outcome of the motions. I just think that  
18 spring 2019 trial date is not remotely realistic.

19 THE COURT: As I mentioned, I think, at least in my  
20 view, and again some of my colleagues differ, and I understand  
21 the need to have -- both sides to have advance knowledge of  
22 when the trial is going to be so that witnesses for whatever  
23 parts of the case can be contacted and adequately prepared. I,  
24 however, at this stage don't think I have a sufficient amount  
25 of information to make a determination about whether April is

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1 the appropriate date or September is the appropriate date or  
2 some time in between.

3 So what I am going to propose is the following: I am  
4 going to ask that the parties provide me with a status update  
5 of the case every two months, and I will issue an order  
6 indicating what specific dates those updates should happen.  
7 Those updates, as a general matter, should include, for  
8 example, the status of the preparation and distribution of the  
9 transcripts that have been -- the foreign language transcripts  
10 that have been translated, any additional discovery that the  
11 government anticipates providing, whether or not there has been  
12 any change in the scheduling with regard to the death penalty  
13 consideration by the Department of Justice, so that I have a  
14 better sense between now and the next -- the first letter I  
15 receive, the first letter, whether or not we are proceeding at  
16 the pace that the parties anticipated proceeding, so that I  
17 could have a better sense of whether -- what date makes the  
18 most sense. It is obviously we are talking -- the parties  
19 agree that that date at the earliest is April of 2019, so we  
20 are still talking a fair amount of time away.

21 Just to be clear, it is not my intention -- I plan on  
22 providing adequate time to allow the parties to do what they  
23 need to do to adequately prepare for this trial. Obviously, if  
24 I am going to -- if I decide, after receiving the first status  
25 update, or even the second, that I want to set a trial date, I



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1 will have the parties in and we will talk about it in more  
2 detail at that point concerning what date in my mind I think  
3 makes the most sense, after I see where things stand from the  
4 parties' standpoint.

5 So you are not going to get a trial date today I guess  
6 is the short answer, but I am not ruling out making that  
7 determination after I see whether or not the parties are  
8 actually able to meet the dates that they set forth.

9 Yes.

10 MS. HOULE: Thank you, your Honor.

11 If I may respond to one point defense counsel made, to  
12 the extent that it shapes your Honor's view of this  
13 conversation.

14 In terms of the statistic regarding an average of 36  
15 months between I believe it was indictment and trial, many of  
16 those cases are very different from this case and involve  
17 multidefendant cases, crimes that are committed over years of  
18 time.

19 This is a different scenario here. Defense counsel  
20 has already used as an example, I believe, the prosecution of  
21 the individual who committed the Boston bombing in 2013. That  
22 case proceeded to trial approximately 21 months after the  
23 offense was committed.

24 So we would like your Honor to keep those time frames  
25 in mind when setting a schedule here.

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1 THE COURT: Well, what I would suggest is this: In  
2 that first status letter, the parties should talk to one  
3 another, and the government should basically make a list of the  
4 cases that they believe are appropriate comparators, the  
5 defense should make a similar list, and you should talk about  
6 that, and then provide me in that letter with the cases that  
7 you believe are the appropriate comparators to give me more of  
8 a sense of how much time typically it would take. I think that  
9 would provide me with the additional information that would be  
10 helpful, quite frankly, to setting a trial date that makes  
11 sense, understanding that no case is exactly the same, but  
12 assuming that the parties, there is an overlap, and I imagine  
13 there will be, an overlap between the cases that the defense  
14 and the government believe are appropriate comparators -- I am  
15 not saying it will be 100 percent -- that would be a useful, to  
16 me, a useful thing to have.

17 MS. HOULE: Understood, your Honor.

18 THE COURT: Okay.

19 MR. PATTON: Yes, your Honor.

20 THE COURT: That takes us through the three matters  
21 that the parties had raised that we should discuss.

22 Let me ask, are there any issues that the parties  
23 believe that we should take up at this time from the  
24 government?

25 MS. HOULE: Unless the defense has any other issues,

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1 the government moves for the exclusion of time.

2 THE COURT: Okay.

3 MR. PATTON: No objection, your Honor.

4 THE COURT: All right. So I will -- Ms. Williams, two  
5 months from today, what's that first date?

6 THE DEPUTY CLERK: Should be March 23, Judge.

7 THE COURT: I will say this, I will make an  
8 observation. Mr. Patton, you have indicated that this is a  
9 complex case. Do you think it is sufficiently complex under  
10 the Speedy Trial Act to qualify as such?

11 MR. PATTON: I do, your Honor.

12 THE COURT: And does the government agree to that with  
13 regard to exclusion of time?

14 MS. HOULE: Yes, your Honor.

15 THE COURT: So what I will do is, March 23 I expect to  
16 get the first letter from the parties. I am going to exclude  
17 the time until March 30 from the time within which Mr. Saipov  
18 would have to go to trial. I find that the exclusion of time,  
19 both on the basis that this is a complex case, that the parties  
20 acknowledge, so that it is appropriate to exclude the time, but  
21 also I find that the time is necessary to allow the parties to  
22 consider -- the government to continue to produce discovery,  
23 and for the defense to review that discovery and continue to  
24 make -- do their investigation with regard to the case. I find  
25 that that exclusion is appropriate and outweighs the interest

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1 of the public and Mr. Saipov in a speedy trial. So the  
2 exclusion will be until 3/30.

3 Is there anything else from the defense?

4 MR. PATTON: No, your Honor.

5 THE COURT: From the government?

6 MS. HOULE: No, thank you, your Honor.

7 THE COURT: All right. Thank you very much for coming  
8 in. We stand adjourned.

9 oOo